

1                   **BEFORE THE BOARD OF ENVIRONMENTAL REVIEW**  
2                   **AND THE DEPARTMENT OF ENVIRONMENTAL QUALITY**  
3                   **OF THE STATE OF MONTANA**

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4   **In the matter of the amendment**  
5   **of ARM 17.24.132, 17.24.133,**  
6   **17.24.134, 17.24.136,**  
7   **17.24.1206, 17.24.1211,**  
8   **17.24.1218, 17.24.1219,**  
9   **17.24.1220, 17.56.121 and the**  
10   **repeal of 17.24.1212**  
11   **pertaining to revising**  
12   **enforcement procedures under**  
13   **the Montana Strip and**  
14   **Underground Mine Reclamation**  
15   **Act, the Metal Mine**  
16   **Reclamation Laws and the**  
17   **Opencut Mining Act, and the**  
18   **amendment of ARM 17.30.2001,**  
19   **and 17.30.2003, repeal of**  
20   **17.24.1212, 17.30.2005,**  
21   **17.30.2006 and 17.38.606 and**  
22   **the adoption of new rules I**  
23   **through VII pertaining to**  
24   **providing uniform factors for**  
25   **determining penalties**

**PRESIDING OFFICER REPORT**

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16                   **INTRODUCTION**

17           1.       On January 31, 2006, the undersigned presided over and conducted  
18   the public hearing held in Room 152 of the State Capitol Building, Helena,  
19   Montana, to take public comment on the above-captioned proposed amendments,  
20   repeal and adoption of new rules. The amendments, repeals and new rules pertain to  
21   the standardization of administrative enforcement procedures and the penalty  
22   calculation process for the environmental laws administered by the Department of  
23   Environmental Quality (“Department”) and the Board of Environmental Review  
24   (“Board”). The changes implement legislative enactments in HB 428 and HB 429  
25   from the 59th Montana Legislature.

26           The Notice of Public Hearing on Proposed Amendment, Repeal and  
27   Adoption was contained in the 2005 Montana Administrative Register (MAR)

1 No. 24, MAR Notice No. 17-239, published on December 22, 2005. A copy of the  
2 notice is attached to this report. (Attachments are provided in the same order as  
3 they are referenced in this report.)

4 2. The hearing began at 10:30 a.m. The hearing was transcribed by  
5 Ms. Laurie Crutcher of Helena, Montana.

6 3. The undersigned announced that persons at the hearing would be  
7 given an opportunity to submit their data, views, or arguments concerning the  
8 proposed action, either orally or in writing. At the hearing, the undersigned also  
9 identified and summarized the MAR notice, stated that copies of the MAR notice  
10 were available in the hearing room, and read the Notice of Function of  
11 Administrative Rule Review Committee as required by Mont. Code Ann. § 2-4-  
12 302(7)(a). The rulemaking interested persons list and the opportunity to have names  
13 placed on that list was addressed. Also referenced was the authority to make the  
14 proposed rule amendments, repeals and adopt the new rules as well as the  
15 opportunity to present matters at the hearing or in writing, as stated in the MAR  
16 notice. The order of presentation of testimony was explained.

### 17 **SUMMARY OF HEARING**

18 4. Mr. John Arrigo, Administrator of the Enforcement Division,  
19 Department of Environmental Quality (DEQ) gave a brief statement that the  
20 Department was recommending that the amended rules, repeals and proposed new  
21 rules be adopted as proposed in the MAR notice.

22 5. Mr. Dave Galt, Director of the Montana Petroleum Association,  
23 Mr. Don Allen, Executive Director of the Western Environmental Trade  
24 Association, Mr. Bud Clinch Executive Director of the Montana Coal Council,  
25 Mr. Michael Kakuk of the Montana Contractor's Association and Mr. Mike Newton  
26 of Fisher Sand and Gravel provided oral testimony which was followed up by  
27 written testimony. Most comments which are too numerous to summarize addressed

1 the subjectivity of the standards, the broad discretion and vagueness of the rule  
2 changes and the unexpected stringency of the rules.

### 3 **SUMMARY OF WRITTEN MATERIALS**

4 6. After the hearing, written comments were received from the following  
5 individuals all of whose comments were adequately summarized in the response to  
6 comments prepared by the Department: Mr. Steve Hicks of White Sulphur Springs  
7 (general objection); Mr. Bud Clinch, Executive Director, Montana Coal Council;  
8 Mr. Robert Montgomery, Western Energy Company; Northwest Montana Gold  
9 Prospectors Club; Mr. Neal Marxer of Smurfit-Stone, Mr. John Etienne;  
10 Mr. Donald Quander representing the Montana Industry Clean Air Act Coalition;  
11 Mr. Don Allen, Executive Director of the Western Environmental Trade  
12 Association (WETA), Mr. Michael Kakuk, representing the Montana contractor's  
13 Association; Mr. Greg Brown on behalf of CHS Inc. Laurel Refinery;  
14 Mr. Jay Bodner on behalf of the Montana Stockgrowers Association; Mr. Jay Barber  
15 on behalf of the Montana Environmental Information Center; Ms. Abigail Dillen on  
16 behalf of Earth Justice; Mr. Loran Frazier on behalf of the Montana Department of  
17 Transportation; Mr. John Wardell on behalf of the United States Environmental  
18 Protection Agency; Mr. David Galt on behalf of the Montana Petroleum  
19 Association. The comments are attached for the Board's review.

20 The Department also submitted a memorandum from DEQ staff attorney,  
21 Jim Madden with HB 521 and HB 311 reviews of the proposed amendments, repeal  
22 and adoption of new rules and a Private Property Assessment Act Checklist.  
23 Mr. Madden's memorandum is attached to this report.

24 7. HB 521 does not apply to these proposed amendments and new rules  
25 pertaining to mining under Title 82, MCA. The Department has argued that no HB  
26 521 findings are necessary for enforcement rules under the other environmental  
27

1 statutes because the specific provisions of HB 429 control over the general  
2 requirement for stringency findings under HB 521.

3 8. With respect to HB 311 (the Private Property Assessment Act, Mont.  
4 Code Ann. §§ 2-10-101 through 105), the State is required to assess the taking or  
5 damaging implications of a proposed rule affecting the use of private real property.  
6 This rulemaking affects the use of private real property. A Private Property  
7 Assessment Act Checklist was prepared, which shows that the proposed  
8 amendments and new rules do not have taking or damaging implications.  
9 Therefore, no further assessment is required.

10 9. The period to submit comments ended at 5 p.m. on February 7, 2006.

11 **PRESIDING OFFICER COMMENTS**

12 10. The Board and the Department have the authority to adopt and amend,  
13 the amendments, repeals and rules referenced in this rulemaking pursuant to the  
14 provisions in the Montana Code Annotated sections referenced under the  
15 designation, "Imp." under the rules in the initial notice of adoption.

16 11. House Bill 521 (1995), codified in the Water Quality Act at Mont.  
17 Code Ann. § 75-5-203, for example generally provides that the Board may not adopt  
18 a rule that is more stringent than comparable federal regulations or guidelines,  
19 unless the Board makes written findings after public hearing and comment. The  
20 proposed amendments do not appear to be more stringent than a comparable federal  
21 regulation or guidelines. Therefore written findings are not necessary.

22 12. House Bill 311 (1995), the Private Property Assessment Act, codified  
23 as Mont. Code Ann. § 2-10-101 through -105, provides that a state agency must  
24 complete a review and impact assessment prior to taking an action with taking or  
25 damaging implications. A Private Property Assessment Act Checklist was prepared  
26 in this matter. The proposed amendments do not have direct taking or damaging  
27 implications for property. Therefore, no further HB 311 assessment is necessary.

1           13.    The procedures required by the Montana Administrative Procedure  
2 Act, including public notice, hearing, and comment, have been followed.

3           14.    The Board may adopt the proposed rule amendments, repeals and new  
4 rules, or reject them, or adopt the rule amendments and new rule with revisions not  
5 exceeding the scope of the public notice.

6           15.    Under Mont. Code Ann. § 2-4-305(7), for the rulemaking process to  
7 be valid, the Board must publish a notice of adoption within six months of the date  
8 the Board published the notice of proposed rulemaking in the Montana  
9 Administrative Register, or by June 22, 2006.

10          Dated this \_\_\_\_\_ day of March, 2006.

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KATHERINE J. ORR  
Presiding Officer